SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925.

No.

ATLANTIC COAST LINE RAILROAD COMPANY,
PETITIONER,

vs.

IDA MAY SOUTHWELL, ADMINISTRATRIX OF H. J. SOUTHWELL, DECEASED, RESPONDENT.

BRIEF FOR PETITIONER.

Official Report.

The decision of the Supreme Court of North Carolina is officially reported in 191 N. C., 137 (Strong's Adv. Sheets, Feb. 26, 1926).

Statement of Grounds of Jurisdiction.

The date of the judgment sought to be reviewed herein is February 17, 1926 (R., 84). The action was specifically brought, tried, and determined by the State courts under the Federal Employers' Liability Act of

1908, and it is admitted of record that intestate was engaged in interstate commerce when killed (R., 6, 39, 48).

Petitioner duly moved for a nonsuit at the close of plaintiff's evidence and at the close of all of the evidence for failure of the evidence to show actionable negligence, and excepted and assigned error to instructions submitting the question of negligence in failing to exercise due care to prevent Southwell's death, with knowledge of Dallas' intention to assault him, and also excepted and assigned error to refusal of instruction that if intestate was shot by Dallas when not acting within the scope of his employment or in the furtherance of the railroad company's business, but on account of personal feelings between the parties, defendant would not be liable (R., 62, 63, 64, and 65). All of these questions were raised and argued in the State Supreme Court.

The jurisdiction of this Court is invoked herein under the Federal Employers' Liability Act of 1908, as amended, and under Judicial Code, section 237, as amended by act of Congress September 6, 1916, chapter 448, section 2, and act of February 13, 1925, chapter 229, section 1.

Cases which sustain the jurisdiction of this court are:

Davis, Director General vs. Green, 260 U. S., 349.
New Orleans and N. E. R. Co. vs. Harris, 247 U. S., 367-371.

Statement of Case.

The essential facts of the case, as well as the grounds of liability relied on, are fully stated in the accompanying petition for certiorari and need not be repeated at this time. Any necessary elaboration of the evidence with respect to alleged negligence will be made in the course of the argument.

A copy of the map used upon the argument before the Supreme Court of North Carolina is inserted in the back of this brief, for the information of the Court, to show the locations of the places and buildings described by the witnesses. The distances shown on the map are taken from the testimony of respondent's witness Fonvielle.

ARGUMENT.

I.

The Proximate Cause of Intestate's Death was the Wilful and Criminal Acts of Dallas, Which Were Wholly Outside the Scope of His Authority and Not in Furtherance of the Master's Business and Committed Without Its Direction, Knowledge, or Approval, so that Petitioner is Not Liable Therefor.

The fact that the killing of plaintiff's intestate by Dallas was a wilful homicidal act is not only repeatedly alleged in the complaint, but stands admitted and proved by all of the evidence heretofore set out in the petition, and it is petitioner's earnest contention that this case falls clearly within the decision of this Court

in *Davis, Director General vs. Green*, 260 U. S., 349. In the *Green* case this Court held that a railroad company was not liable under the Federal Employers' Liability Act (whatever the State law might be) for the wanton and wilful act of its engineer in killing his superior officer, the conductor, in order to satisfy his temper or spite aroused by the order of the conductor, which it was his duty to obey, *although the evidence in the State court showed that the engineer was a dangerous man, who habitually carried a pistol and had attempted theretofore to run a train over the deceased, and had been employed by the railroad company with notice of his dangerous characteristics, and although the act was done while the engineer was on duty and acting under his employment.* The following vigorous language from the opinion of Mr. Justice Holmes therein, taken from pages 351 and 352 of the opinion, clearly shows the reasoning of this Court:

> "The ground on which the railroad company was held was that it had *negligently* employed a dangerous man, with notice of his characteristics, and that the killing occurred in the course of the engineer's employment. But neither allegations nor proof *present the killing as done to further the master's business, or as anything but a wanton and wilful act*, done to satisfy the temper or spite of the engineer. Whatever may be the law of Mississippi, a railroad company is not liable for such an act under the statutes of the United States. The only sense in which the engineer was acting in the course of his employment was that he had received an order from Green which it was his duty to obey—in

other words, that he did *a wilful act wholly outside the scope of his employment, while his employment was going on.* We see nothing in the evidence that would justify a verdict unless the doctrine of *respondeat superior* applies." (Italics ours.)

In order to recall to the attention of this Court just how strong the facts were in the *Green* case (under the very theory of negligence advanced by plaintiff Southwell in the present case), we will quote below some of the facts and findings of the Supreme Court of Mississippi, as found in 87 So., page 649, *et seq.*, which facts this Court did not question in rendering its decision above quoted from. It appears that decedent Green was a conductor and was killed by McLendon, an engineer, while they were both working in the same crew. It was proved that some years before the killing deceased and the engineer had worked together and had a personal quarrel about the work, and deceased was temporarily removed to a different crew, but some time before the killing he was placed back in the crew with McLendon, the engineer. The Mississippi Supreme Court thus further states the evidence (page 651):

"It appears from the evidence for the plaintiff that McLendon was a contentious, disagreeable, and quarrelsome man; that he was constantly embroiled with his fellow employees in quarrels about the work; that he would not obey signals, and that he was a stickler for the rules; that he frequently had quarrels, *and had habitually carried a pistol*, either on the engine

seat or upon his person; and *that he had been frequently reported to the railroad company.* It also appeared in evidence that Green had reported him for violating his duties on a number of occasions. It was also in testimony for the plaintiff *that he, the engineer, had several times tried to catch Green between the cars and then move his engine* so as to injure him. It was also in proof that he had killed a man prior to the killing of Green about some matter disconnected with the railroad business, and that the employees of the yard regarded him as a turbulent, dangerous, and violent man, and also that he had the general reputation in the community of being a dangerous, quarrelsome, and violent man." (Italics ours.)

It is further stated by the Mississippi court:

> "*In the present case there is ample proof that the master had knowledge of the vicious disposition and violent character of the engineer who committed the assault in this case, so as to make him* liable (the master), regardless of the rule above stated, provided, of course, that the servant was acting within the scope of his employment, and *with a view of his master's business.*"

The facts in the *Green* case are much stronger in favor of a recovery (if respondent's theory of recovery were sound), than are the facts in the present case, as plaintiff's own evidence in the present case shows that Dallas was off duty at the time he killed Southwell (if that were material), and affirmatively shows that, instead of Dallas being a dangerous man to the railroad

company's knowledge, *all of the information which had been brought to its knowledge showed that Southwell, the decedent, was the dangerous man, and had made threats and attempted to harm Dallas*, and the railroad company had no actual or implied knowledge of any intention of Dallas to harm Southwell.

Another case almost directly in point and much stronger on its facts in favor of the employee than the present case is *Roebuck vs. Atchison, T. & S. F. Ry.*, 99 Kansas, 544; 162 Pac., 1153. The facts are correctly stated in the following headnote from the Pacific Reporter:

> "In an action brought under the *Federal Employers' Liability Law* (sections 8657-8665, U. S. Comp. St., 1913) to recover damages for the death of plaintiff's husband, a section foreman in defendant's employ who was stabbed by a Mexican employed under him, the petition alleged that plaintiff's intestate notified his superior officers, the roadmaster and the assistant division superintendent, that he could not get along with the Mexican, and had told him to go home; that the next day his superior officers ordered him to put the Mexican back to work; *that he then informed the assistant division superintendent that it would be impossible for him to keep the Mexican at his work owing to his quarrelsome disposition, that the latter was a dangerous man and had killed one or two men, and that he did not care about the Mexican taking a shot at him;* that afterwards the road-master advised him he had no reason to fear a personal attack or encounter and ordered him to keep the Mexican at work, *and stated that the Company*

> *would see that no harm came to plaintiff's intestate and would protect him;* that, relying upon the assurance, he continued in the defendant's employ as foreman, while the Mexican remained a member of the section gang; and that, while both men were in the employ of the defendant within the scope of their employment, the Mexican stabbed and killed plaintiff's intestate without warning and without provocation. Held that, on the facts alleged in the petition no cause of action was stated under the Federal Employers' Liability Law, for the reason that on the undisputed facts the assault "*was not committed in the course or scope of the Mexican's employment, nor in the furtherance of the defendant's business.*" (Italics ours.)

Here the employer was fully advised of the dangerous character of the employee and promised to protect its foreman from harm from the alleged dangerous employee. In its opinion the Kansas Supreme Court said:

> "The Federal Employers' Liability Law gives a right to recover for injury or death of an employee of an interstate carrier 'resulting in whole in part from the carrier's negligence,' *and the present action is predicated solely upon the negligence of the defendant carrier in retaining in its employ a vicious, turbulent, and dangerous fellow-servant of plaintiff's intestate, with actual notice of the dangerous character of such fellow-servant.*"
>
> "The difficulties which present themselves are these: It is conceded, indeed it could not be seriously contended otherwise, that Negreta, when

he stabbed plaintiff's intestate, was not engaged in carrying on the work which he had been employed to do, nor in the furtherance of that work. His criminal act was outside and beyond the scope of his employment. *The duty which the law imposes in the master to exercise ordinary care in the selection of competent and suitable fellow-servants has uniformly been applied, so far as we have been able to discover, only where the alleged incompetency had reference to the duties which the servant was employed* to perform. As a rule, the cases where the master has been held liable for the failure to perform his duty have been those where he has negligently retained in his employ a servant addicted to drunkenness, which rendered the servant unfit, and thereby caused some accident resulting in injury to another servant, or where the master retained in his employ inexperienced or unskilled servants, whose blunders and mistakes have caused injury to another servant; or where the injury was occasioned by the master's failure to have a sufficient number of servants to perform the work. The master's negligence, in other words, has always been predicated on his failure to perform some duty which the law imposes upon him as master and which he owes to the servant." (Italics ours.)

In the case of *Louisville and N. R. Co. vs. Hudson*, 10 Ga. App., 169; 73 S. E., 30, it appeared that a railroad engineer wilfully shot and killed the conductor while the crew were switching cars. The trainmen had a controversy as to who cut out the air on the train, and the engineer got a revolver from his engine box and

shot the conductor. The court held that the employer was not responsible for the homicide, because it was done without the scope of the employee's authority. The court said:

> "If the act of the engineer in the present case was, as we have held, his personal act, and not one for which the master was responsible, *it would be wholly immaterial, on the question of the master's liability, whether the servant was of ungovernable temper, or habitually carried a pistol, while on duty.* If the master was liable because the act was performed by the servant within the scope of his employment, the employee's temper, or unfitness, or the fact that he carried a pistol with the master's knowledge, might be circumstances to be considered on the question of exemplary or punitive damages; but these facts of themselves cannot make the master liable for an act done by his servant outside the scope of his employment for which the master is not otherwise responsible. In other words, we do not think that the fitness, or the temperament or disposition, of the employee, or his private habits, are material facts to be considered, except on the question of aggravation, where the master is otherwise liable for the act of the servant."

The court carefully distinguished between such a case and those cases where the special relationship was involved, such as carrier and passenger.

We wish also to call the Court's attention to the North Carolina case of *Roberts vs. So. Ry.*, 143 N. C., 176; 8 L. R. A. (N. S.), 789, and note, which involved a

wilful assault by a yard master, as in the present case, and in which it was held by the supreme court (*but with different judges*), that the master was not liable. The evidence showed that plaintiff had made some mistake in switching operations and shortly thereafter went to the yard office, and a little later the yard master came in and spoke to plaintiff about the mistake, and plaintiff called the yard master "a swell-head," whereupon the yard master assaulted him. Our supreme court there held that the railroad company was not liable and laid down the following test of liability:

> "*The test is not whether the act was done while Bradley (the yardmaster) was on duty, or engaged in his duties, but was it done within the scope of his employment and in the prosecution and performance of his business which was given him to do?*"

The court further said:

> "Both plaintiff and defendant testify that the conduct of plaintiff in changing, or failing to change, the switch has passed at the time of the quarrel. Whether plaintiff went into the office, and Bradley afterwards came in; or Bradley went into the office, and was later followed by plaintiff, does not affect the question in this aspect of the case. *Both statements show that the conduct of plaintiff about the switch as a physical act was a closed incident;* and that, at the time Bradley was neither directing plaintiff about his work nor giving him instructions about it for the future; nor even physically correcting him about it in the past. It was simply a quarrel that two employers had about a past

> event in which Bradley was clearly acting of his own mind and will as an independent agent, and in which plaintiff is not at all free from fault. There is no error, and the judgment below is affirmed."

Assuredly the yardmaster in that case was under as much duty to protect other employees under him and refrain from injuring them as was either Fonvielle, general yardmaster, or Dallas, assistant yardmaster, in the present case. This decision is sound, is in accord with the decision of this Court in the *Green* case, *supra*, and should have been followed in the instant case.

The North Carolina court has also elsewhere recognized that "intentional violence is not negligence."

> *Ballew vs. Asheville & E. T. R. Co.*, 120 S. E. 334 (N. C.).

Negligence is the basis of an employee's right to damages under the Federal Employers' Liability Act. *New York Central Ry. Co. vs. Winfield*, 224 U. S. 147, and there is no liability by the employer under that act for a willful wrong, such as a murder. In Roberts' Federal Liabilities of Carriers, volume 1, section 552, it is stated:

> "*Willful Wrongs not Within Terms of the Act.*—By its terms the national act is limited to negligent acts of a common carrier. Under well known principles of law, injuries caused by the willful or intentional acts of another are not within the terms of the statute, for, as quaintly said by one jurist, 'when willfulness

> comes in at the door negligence goes out through the window.' Most statutes, giving rights of action for death, define the wrongful act as the 'wrongful act, neglect or default of another' which would include intentional wrongs; but the federal act, for some reason, has confined the wrongful acts for which a recovery can be had, to those which are due to negligence solely. A willful assault of one employee upon another would be beyond the terms of the statute."

Other text writers make the same statement of the law. In Thorton's Federal Employers' Liability Act (3d ed.), section 196, page 292, it is said:

> "*Willful Injury.*—It is only in case of negligence that the carrier is liable under the Federal statute; therefore *it is not liable under it for a willful injury*, nor for any negligent injury not specified in the statute. To recover damages for such injuries the employee must resort to the law of the State wherein the action is brought or the injury sustained, but it has been said that an interstate employee no longer has a right of action to recover damages for a willful injury."

The specific wording of the act itself would clearly appear to imply this.

While we do not deem it very material to a decision of this case whether Dallas was "on duty" or not at the time he shot Southwell, we think the evidence in the record clearly shows that he was not on duty, but went off duty at 4 p. m. on the afternoon of the homicide (R., 15, 20, 22, 23, 25, and 26). Any telephoning he may have done after 6 o'clock, as testified to, is shown

to have been a voluntary act (R., 25 and 26). Evidence was admitted at trial as to telephoning by Dallas (R., 25) for another employee at 6:40 p. m., but it appears from the evidence that he was asked about this employee *before* he went off duty, at 4 p. m., and nothing further was said to him about the matter by anyone having authority to require him to work after he went off duty, or by anyone else in fact, so that anything he did about locating the employee after that time was purely voluntary. Petitioner excepted and assigned error to this evidence, which was offered in an effort to show that he was on duty at the time (R., 25, 59), but the State supreme court held that this evidence was not prejudicial. We think the effect of the evidence must have been prejudicial, as tending to impress the jury with the idea of the railroad company's responsibility for Dallas' acts, but, in view of the other clear and important grounds for reversal in the record, we do not argue this question further. See incidentally, as to when an employee is on duty, the cases of *United States vs. C., M. & P. S. Ry. Co.*, 195 Fed., 783-785, and *United States vs. Denver & R. G. Co.*, 197 Fed., 629-631.

Another point to which we wish to call the Court's attention in this connection is that the complaint alleges that General Yard Master Fonvielle knew that Dallas intended to criminally assault Southwell, and the State supreme court in its opinion practically finds the same thing. The opinion states (R., 83):

> "The yard master did nothing to restrain or stop his subordinate with knowledge that Dallas was going to upbraid him, but *allowed him* on

> the company's yard, as the engineer approached the gate exit, to shoot the engineer, who was unarmed."

This finding (which we will show was wholly unjustified by the evidence), if true, taken in connection with the evidence as to Dallas and Fonvielle's association just prior to the homicide, would practically make Fonvielle an aider and abettor of the crime of murder, and, consequently, a coprincipal, under the law of North Carolina, as stated in *State vs. Jarrell*, 141 N. C., 722 725, which holds that mere presence alone is regarded as encouraging and abetting a crime where the bystander is a friend of the actual perpetrator and knows that his presence will be regarded as encouragement and protection. Now, obviously, if Fonvielle actively participated in the commission of the crime, the railroad company would not be responsible for his criminal act under the doctrine of the *Green* case, *supra*, and other authorities cited, any more than it is responsible for the criminal acts of Dallas. The State supreme court's finding, therefore, proves too much in this case. However, we will show under the next subdivision of this brief that the court's conclusions of fact are entirely unwarranted by the evidence.

It is an interesting fact in this case that, from its inception, your petitioner has relied on the decision of this Court in the *Green* case, *supra*, as being controlling and cited it in all of its briefs in both appeals, but the case has not been distinguished or even mentioned in either of the briefs filed by respondent in the

State supreme court, nor is it mentioned in the State supreme court's opinion. We respectfully submit that this decision, together with the other authorities cited, is conclusive against liability by petitioner in this case.

II.

There is no Evidence to Authorize a Finding that Petitioner, Through Its Officials, Knew that Dallas Intended to Assault or Kill Southwell and was Negligent in Failing to Protect Him from Dallas or Otherwise.

The complaint expressly alleged (R., 2) that defendant railroad company (petitioner) negligently, wantonly, and wilfully caused Southwell's death *and murder* through its assistant yard master, Dallas, "who, to the knowledge of his superior officer, the defendant's chief yard master, E. L. Fonvielle, was waiting near the exit from defendant's premises for the express purpose of assaulting plaintiff's intestate," etc.

The supreme court found and held that the evidence sustained a finding of the above facts. The facts, a finding of which the State supreme court held was sustained by the evidence, fixing liability upon petitioner, are stated in next to the last paragraph of the State supreme court's opinion (R., 83). The court there said:

> "The yard master did nothing to *restrain* or stop his subordinate, *with knowledge that Dallas was going to upbraid him, but allowed him, on the company's yard, as the engineer approached the gate*, to shoot the engineer, who was unarmed."

We will proceed to briefly show that this finding is not sustained by any evidence in the record, and, further, that it is directly against the evidence and the testimony of respondent's own witnesses.

The first significant facts bearing on petitioner's alleged knowledge of Dallas' felonious intent to assault or kill Southwell are that, up to the very day and hour of the shooting, all of the facts testified to definitely pointed to the conclusion *that it was intestate Southwell who was the dangerous man;* Southwell was bitterly antagonistic to Dallas and all other employees who assisted in maintaining the operation of the railroad during the strike, and Southwell had several times *threatened Dallas* and had cursed and abused him (R., 12, 13, 28, and 29); his conduct and feelings *toward Dallas* had been such that the superintendent was impelled to impress upon Mr. Southwell that *if anything happened to Mr. Dallas* it might not look well for Southwell, in view of his remarks and conduct toward Dallas (R., 28). What, on the other hand, was Dallas' known attitude toward Southwell up to the very time of the killing? "He did not, to my knowledge, at any time prior thereto make any threat against Southwell, and he had not at any time prior to the killing shown any animosity toward Southwell" (R., 20). The record affirmatively shows, therefore, that none of the facts brought to the attention of petitioner's officials indicated any intention or probability that Dallas would assault or harm Southwell, but everything pointed to the contrary. It is elementary that, to charge one with knowledge of a fact and re-

sponsibility based on such knowledge, the evidence must at least tend to show that such person has information which would lead him as a reasonable man to believe that the fact existed. If all of the information coming to petitioner's officials reasonably lead it to believe that Southwell might harm Dallas, but that Dallas had no apparent intention of harming Southwell and no animosity toward him, then, obviously, petitioner cannot be charged with a knowledge which the facts did not show. Respondent's counsel were so bold as to actually argue in this case—and apparently the State court must have agreed with them—that the fact that petitioner knew that Southwell had abused and threatened Dallas should put it on notice that Dallas might or would assault or kill Southwell. We submit that such reasoning is inconsistent with all sound ideas of logic, evidence, or justice.

We will next examine the evidence in the record (given by respondent's own witnesses) as to what occurred at or shortly preceding the actual shooting, in order to ascertain whether it at all sustains the allegations of the complaint and the State supreme court's conclusion that Fonvielle had knowledge that Dallas intended to upbraid and assault Southwell and did nothing *to restrain or stop* Dallas, but *allowed him* to shoot Southwell. The evidence shows that in their walk from the "butting block" to and past the place of the shooting Dallas said to Fonvielle that he wanted to see Southwell and ask him to let him alone and added (R., 11): "All I want to do is to ask Southwell to lay off of me and *let me alone.*" This assuredly

does not sustain the State supreme court's finding that Fonvielle knew that Dallas was going to "upbraid Southwell." It simply shows that Dallas, after having been abused and threatened several times by Southwell, without provocation, wanted to ask him to let him alone and quit abusing him. Besides, the evidence shows that Dallas and Southwell had come in contact several times before that during the strike, and that Dallas had not only not harmed Southwell, but had not threatened him, so that Fonvielle, from this request of Dallas, had no cause whatever to apprehend that Dallas had intended to upbraid or harm Southwell. But what did Fonvielle, the general yardmaster, say to Dallas' request to see Southwell and ask him to let him alone? Fonvielle said to him (R., 14):

> "I remarked to Mr. Dallas at the time that he must not see Mr. Southwell, that if he saw Mr. Southwell and talked to him it might bring about unpleasant circumstances."

The supreme court's finding, therefore, that "the yardmaster did nothing to restrain or stop his subordinate" is not sustained, but is contradicted by the evidence. What more should Fonvielle reasonably have said or done in the light of his knowledge of the situation? Should he have at once discharged Dallas? Should he have remained with Dallas indefinitely to see that he did not interview Southwell? We submit that such action by Fonvielle would have been highly unreasonable under the facts, if not absurd.

It is said by the State supreme court, however, that

Fonvielle knew, or in the exercise of reasonable care should have known, that intestate Southwell "had to pass out of the gate near his office about the time he approached the gate and was shot by * * * Dallas."

What are the facts? Southwell's train was due in Wilmington about 5:30 p. m. (R., 12), and, according to one of plaintiff's witnesses, he came in around 5 p. m. (R., 30), but the homicide did not occur until about 7 p. m. (R., 10). Therefore a period from one and one-half to two hours elapsed from the time Southwell came in on his run until he started to leave the premises. The record shows that the only thing he had to do after coming in on his run was to "wash up" and change his clothes, and this, ordinarily, as a matter of common experience, does not take an hour and a half or two hours. If Fonvielle had given thought to the matter, therefore, it would have been entirely reasonable and natural for him to have concluded that Southwell had already come in on his run and gone home at the time Fonvielle and Dallas were walking through the concourse. This consideration alone, therefore, negatives the State supreme court's conclusion in its opinion that the general yardmaster, Fonvielle, in the exercise of reasonable care, ought to have known that Southwell had to pass out of the gate "about the time he approached the gate and was shot" by Dallas. Furthermore, Fonvielle testified (R., 18 and 19) that at the time he was with Dallas he had no knowledge or intuition whatever that Southwell's train was in or that Southwell was anywhere around there or

that Dallas intended to wait and see him. Here again, therefore, the State supreme court's conclusion is unsupported by the evidence. Moreover, we submit, it would not follow that Fonvielle was guilty of any negligence, even if he had known that Southwell might not have left the premises at the time he was talking to Dallas. As heretofore shown, Fonvielle had no reason to think that Dallas intended to assault or harm Southwell from what had theretofore happened, and had also expressly forbidden Dallas to talk with Southwell about the latter's past conduct; likewise the two had met and conversed several times in the course of their work theretofore and Dallas had not attempted to harm Southwell and had never made any threats against him, and it was altogether likely that they would at least come in contact with each other in the future in the course of their work, as they had in the past. Putting the actual event of the killing out of consideration, then, which must be done in determining whether Fonvielle acted as a reasonable man, he would not have been negligent even if he had known that Southwell had not yet left the premises and might possibly see Dallas that evening. As heretofore shown, however, there is not a scintilla of evidence to reasonably justify a finding that Fonvielle had such knowledge.

Further considering the evidence bearing on the State supreme court's conclusion that Fonvielle, with knowledge, allowed Dallas to shoot the engineer, Southwell, as he approached the gate, we find that Fonvielle testified for plaintiff, without contradiction, referring to his walk with Dallas through the concourse (R., 11) (italics ours):

"We went on together after that possibly thirty or forty feet, which put us within *four to six feet of the iron gate across the bridge*. I then passed on through the gates in the direction of the lower yard office, and Dallas started back north on the Front Street extension. After passing through the gates I moved approximately *eight to twelve feet* in the direction of the steps that go down to the lower yard, or near to the head of the steps, which was possibly thirty feet from where Dallas and I separated. After reaching this point, I happened to casually glance to the right and saw Southwell and Dallas approaching each other, approximately forty feet from the gates. I turned and came back through the gates heading toward Dallas and Southwell. After passing through the gates, instead of going directly toward Dallas and Southwell, I went at an angle of possibly *fifteen degrees* in the direction of the Station Master's door, which was to the left and between myself and Dallas and Southwell; that was possibly *five seconds* before the shooting occurred. I had probably taken *three steps* inside of the gate before *Southwell grabbed Dallas and I had then moved possibly four or five steps in the direction of Dallas and Southwell before the gun was fired.*"

The foregoing testimony, which stands uncontradicted, hardly needs analysis or explanation. It shows that when Fonvielle first saw Southwell and saw Southwell and Dallas approaching each other Dallas was between fifty and sixty feet from Fonvielle and walking toward Southwell; it shows that Fonvielle promptly

turned around and came back through the gates in the general direction of Southwell and Dallas and had only gotten seven or eight steps within the gates when the shooting occurred and only three steps within the gates when Southwell grabbed Dallas. Assuming that Dallas kept on going toward Southwell during the interval of about five seconds between the time Fonvielle first saw him and Dallas approaching each other and the shooting, Dallas and Southwell must have been around fifty or sixty feet from Fonvielle when the fatal shooting occurred. It is apparent, from this evidence, that Fonvielle did all he could after learning of the impending collision of the men, to prevent it and was unable to do so. Furthermore, Fonvielle expressly testified (R., 19) that he had no knowledge that the altercation was going to take place more than two or three seconds before it occurred, and at that time he was going to them to prevent any further altercation after arriving at where they were. He was then asked: "When you did see Dallas ad Southwell going toward each other, could you, or did you have time to reach them before the shot was fired?" He answered: "Absolutely not; had I had time I would have reached them. When I left Dallas I had no indication, from my conversation with him, as to where he was going."

Fonvielle's testimony that he did not see Southwell until four or five seconds before the shooting is also borne out by intestate's own dying declaration (R., 38), given through his wife, that he was coming from his engine on his way home and "*just as he got in the concourse* he saw two men coming from behind a truck,

and *one went in the opposite direction from the other*, and he said Mr. Dallas came up to him with the gun raised," etc. Of course, he could not have seen either Dallas or Fonvielle until he got in the concourse, and the statement shows that just at the time he did get in the concourse the other man, Fonvielle, was going in the opposite direction from Dallas and, therefore, when Southwell first saw Fonvielle Fonvielle must have had his back toward both Southwell and Dallas, which fully confirms Fonvielle's testimony that he did not see Southwell until he actually looked around after having gone eight to twelve feet beyond the gates. When he did see him and saw the men approaching each other, the testimony clearly shows that he did everything reasonably and humanly possible to reach and separate the men before the shooting occurred.

We earnestly submit, therefore, that the finding of the State supreme court, above set out, is wholly unsupported by the evidence and is directly contrary to the undisputed evidence. Its conclusion could have been reached only by arbitrarily ignoring the evidence we have herein set out and basing its conclusion solely on the event itself; that is, by reasoning that because it turned out that Dallas did assault and kill Southwell, petitioner's officials, and particularly Fonvielle, should have foreseen the event and prevented it. But this method of reasoning is not permissible to fix liability, and the reasonableness of Fonvielle's conduct must be judged solely by the knowledge he had, or was reasonably charged with, *before* the killing; and, viewed in this light, we think it is clear that Fonvielle

(or petitioner, through Fonvielle) cannot be charged with any neglect whatever proximately causing intestate's death. It is well settled by the authorities that a court cannot arbitrarily reject the undisputed testimony of unimpeached witnesses for the purpose of reaching an opposite conclusion of fact, as the State supreme court apparently has done in this case. In the case of *American Freehold Land Mortg. Co. vs. Whaley*, 63 Fed., 743-747 (per Simonton, Cir. J.), it is said:

> "When, however, it is proposed *to contradict the direct testimony of unimpeached witnesses by inferences from facts*, this result cannot be reached unless the existence of these facts and the natural inferences from them cannot be reconciled with the conclusion that the direct evidence is true."

This Court has itself said in *Quock Ting vs. United States*, 140 U. S., 417-420:

> "Undoubtedly, as a general rule, positive testimony as to a particular fact, introduced by anyone, should control the decision of the court."

The following from the opinion of Gaston, J., in *White vs. White*, 20 N. C., 536, 539, is particularly in point:

> "But when it is incumbent on a party to establish a fact, and *the only* testimony in relation thereto contradicts it, a jury cannot capriciously mangle the testimony so as to convert it into evidence of what it does not prove. *If the witness be deserving of credit, the fact*

> ***necessary to be shown is disproved; and if he be not worthy of credit, there is a defect of proof.***"

To the same effect see:

Moore on Facts, vol. 1, sec. 131 and sec. 75, page 119.

Kirby vs. Delaware Canal Co., 46 N. Y. Supp., 777.

Fordham vs. Smith, 46 N. Y., 683.

Traveler's Ins. Co. vs. Selden, 78 Fed., 285 (Fourth C. C. A.), and cases cited.

The State supreme court in its opinion cites and quotes its decision in *Wimberly vs. Railroad*, 190 N. C., 447, as follows:

> "We are not inadvertent to the fact that the plaintiff made a statement on cross-examination as to a material matter, apparently in conflict with his evidence when examined in chief, but this affected his credibility only, and did not justify withdrawing his evidence from the jury."

The answer to this, as applied to the present case, is that Fonvielle, who testified for plaintiff, made no statements on cross-examination in conflict with his testimony in chief, but his testimony is consistent throughout, so that all of it must be considered and given weight. See authorities *supra*. If his testimony and that of the other witnesses is true, it effectually negatives the supreme court's findings of fact

and negligence; if it is not true, or is not considered, then there is a failure of proof. *White vs. White, supra.* We may add that the *Wimberly* case, cited in its opinion by the State supreme court, is the case of *Atlantic Coast Line Railroad Company, petitioner, vs. Wimberly, admr.*, and in that case your petitioner also contended that the Supreme Court of North Carolina had sustained a finding of negligence without any evidence whatever to support it, and this Court has (in March, 1926) granted its writ of certiorari to review the judgment of the North Carolina court.

Before closing the argument on the question of alleged negligence, we will briefly refer to two other matters mentioned in the supreme court's opinion. It says (R., 83): "By looking—there was no obstruction—he (Southwell) could have easily been seen approaching the gate for some distance by the yardmaster." But there was no duty on Fonvielle to look at that particular time, and no occasion for him to do so, since, as the evidence fully shows, he had no reason to believe that Southwell was then approaching.

The supreme court apparently gives some significance to the fact that Dallas, to Fonvielle's knowledge, carried a revolver, and this fact was strongly emphasized in the argument of respondent's counsel. However, the complaint alleges, and the evidence shows, that Dallas had been appointed a special policeman by the authorities of the city of Wilmington. This being true, he was expressly authorized to carry a concealed weapon by North Carolina Consolidated Statutes, volume 1, section 4410. He was also on the prem-

ises of his employer at the time, and even a night-watchman, under such circumstances, may lawfully carry a concealed weapon. *State vs. Anderson*, 129 N. C., 521.

It is also the law that a private corporation or person is not responsible for the acts of a special police officer, appointed by public authority, but employed and paid by the private corporation, when the act complained of "was performed in carrying out his duty as a public officer, *or was committed in furtherance of some personal purpose to the special officer.*" 39 C. J., page 1273.

Cook vs. Michigan Central R. Co., 189 Michigan, 456; 155 N. W., 541.

(a) *Proximate Cause of Intestate's Death was the Criminal Act of Dallas and Not Any Omission of Petitioner.*

While we hardly think it necessary to consider other defensive matter, in view of the entire absence of any evidence of negligence and of the application of the doctrine of the *Green* case to these facts, we think the foregoing proposition would be a further valid defense. Petitioner raised this question by excepting and assigning error to instructions submitting the question of whether the alleged negligence was the proximate cause of intestate's death (R., 64).

In *Jarnagin vs. Traveller's Protective Association*, 133 Fed., 892 (Sixth C. C. A.), the contention was that the negligence of police officers in failing, while they held the deceased under arrest, to prevent his murder

by other persons was the proximate cause of his death, but the circuit court of appeals, opinion by Judge Lurton, said:

> "The shots of his assailants were the direct and proximate cause and the failure of the officers to protect him was only a condition which may or may not have contributed to the result. It may have been easier to kill him because of the condition, but it was not the condition which killed him."

The general rule is thus laid down, after fully discussing the authorities, in a note to the case of *Gilson vs. Delaware, etc., Canal Co.*, 36 Am. St. Rep., at page 842:

> "As it will be seen from the cases cited in the following paragraph, the courts, at least in this country, refuse to hold a tort feasor liable for the results of a subsequent act which is wilfully wrong, unless that act was actually intended by him."

In the case of *Bart vs. Advertiser, etc., Co.*, 154 Mass., —, Holmes, J., says:

> "Wrongful acts of independent third persons (not actually intended by the defendant) are not regarded in law as the natural consequence of his wrongs, and he is not bound to anticipate the general probability of such acts, any more than a particular act by this or that individual."

To the same general effect see:

Wharton on Negligence, sec. 134; 22 R. C. L., pages 124, 137.

Under these authorities, it cannot be said that any act or omission of the petitioner, through its agent, Fonvielle, or other officials, was the proximate cause of the intestate's untimely death.

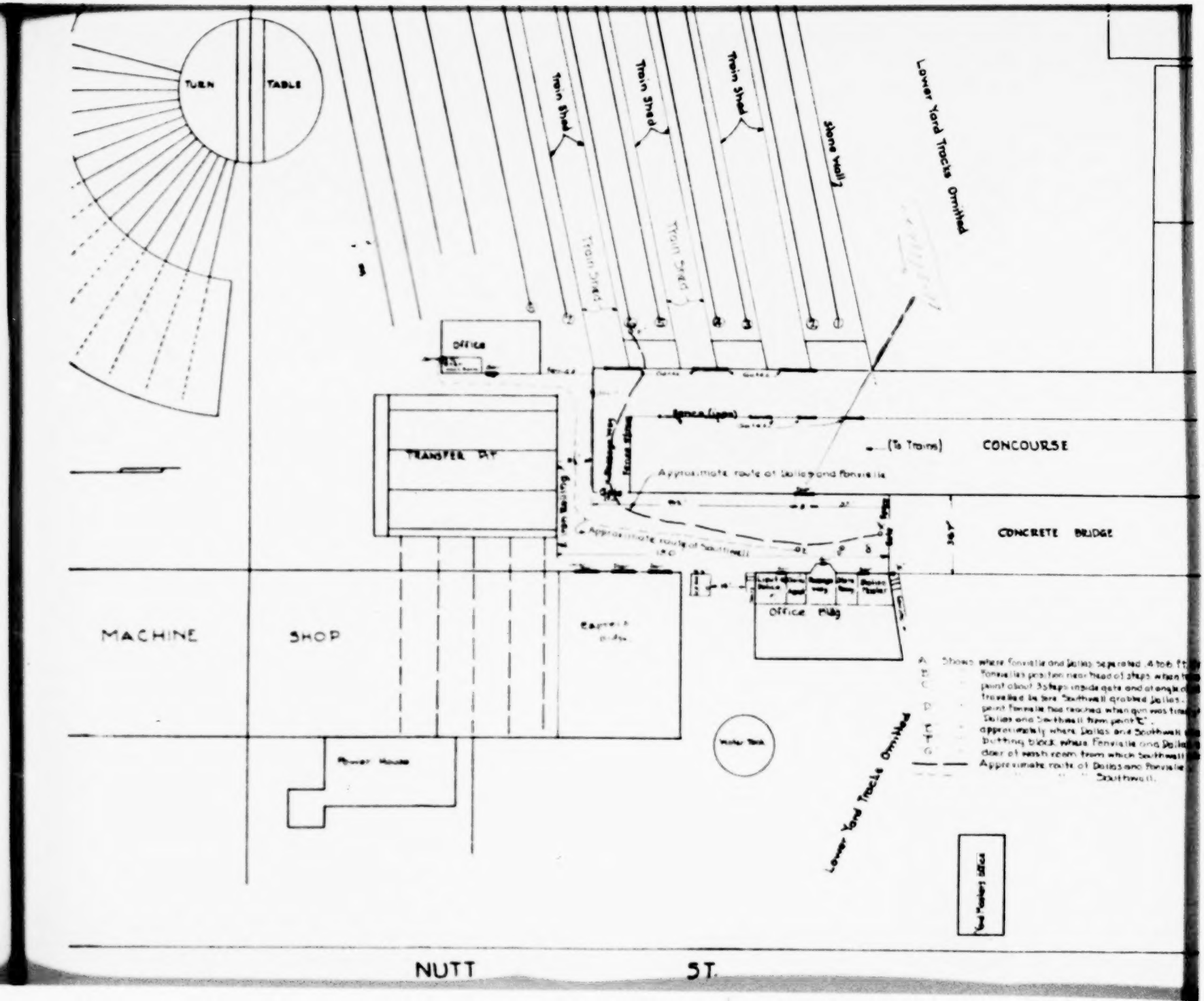
Summing up, the evidence does not authorize a finding in support of any of the allegations of negligence or wrong doing set out in the complaint or found to exist by the State supreme court, but effectually negatives them; the evidence does not show that petitioner negligently and wilfully caused the death of intestate through its agent, Dallas, who, to the knowledge of his superior officer, Fonvielle, was waiting to assault intestate, or that petitioner's officers knew of any murderous rage of Dallas toward Southwell, or that Dallas was deliberating waiting for the purpose of assaulting Southwell, or that Dallas was not a fit or suitable person in whom to impose authority or in whose hands to place dangerous weapons; furthermore, the intestate's own evidence affirmatively shows that the foregoing allegations of the complaint and findings of the State courts were not true or authorized by the evidence. The petitioner strongly feels that the judgment against it in this case is not only not authorized by the evidence, and is contrary to the letter and spirit of the decision of this Court in the case of *Davis, Director General, vs. Green*, 260 U. S., 349, discussed *supra*, but that it is a flagrant violation of all ideas of justice to impose upon it financial responsibility for the unfortunate killing of respondent's intestate. The imposition of such liability, we submit, violates the provisions of the Federal Employers' Liability Act, which requires

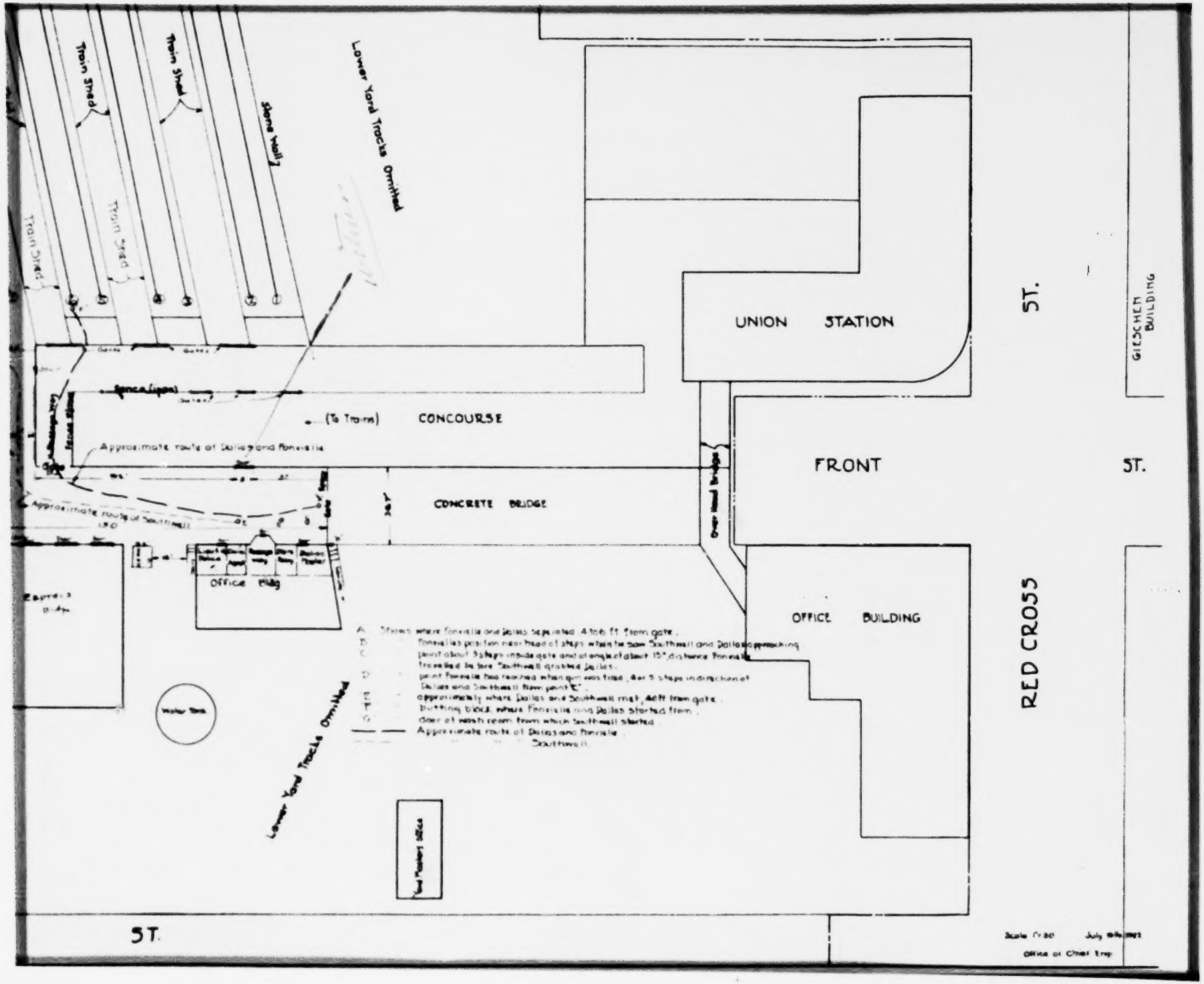
an affirmative showing of negligence as a condition to liability, and contravenes numerous decisions of this Court so holding.

Respectfully submitted,

THOS. W. DAVIS,
Attorney for Petitioner,
Atlantic Coast Line Railroad Company.

J. O. CARR,
V. E. PHELPS,
Of Counsel.


TURN TABLE
Train Shed
Train Shed
Train Shed
Stone Wall
Lower Yard Tracks Omitted
Office
TRANSFER PIT
(To Trains)
CONCOURSE
Approximate route of Dallas and Fonvielle
Approximate route of Southwell
CONCRETE BRIDGE
Office
Bldg
MACHINE
SHOP
Power House
Water Tank
Lower Yard Tracks Omitted
Ticket Office
NUTT
ST.


Train Shed
Train Shed
Lower Yard Tracks Omitted
Shore Wall
UNION STATION
ST.
GIESCHEN BUILDING
CONCOURSE
(To Trains)
Approximate route of Dallas and Fonvielle
FRONT
ST.
CONCRETE BRIDGE
Over Head Bridge
Approximate route of Southwell
Office Bldg
OFFICE BUILDING
RED CROSS
Water Tank
Lower Yard Tracks Omitted
Two Passing Tracks
ST.
A. Shows where Fonvielle and Dallas separated 4 to 6 ft from gate.
B. Fonvielle position near head of steps when he saw Southwell and Dallas approaching
C. point about 3 steps inside gate and at angle of about 15° distance Fonvielle
travelled before Southwell grabbed Dallas.
D. point Fonvielle has reached when gun was fired, & or 9 steps in direction of
Dallas and Southwell from point "C".
E. approximately where Dallas and Southwell met, 46ft from gate.
F. Butting block where Fonvielle and Dallas started from.
G. door of watch room from which Southwell started.
Approximate route of Dallas and Fonvielle
Southwell.
Office of Chief Eng.

SUPREME COURT OF THE STATE OF NORTH CAROLINA.

I, Edward C. Seawell, clerk of the Supreme Court of the State of North Carolina, do hereby certify the foregoing and attached blue print to be a true copy of the map used in this court upon the argument and consideration in the case of Ida Mae Southwell, admx., vs. Atlantic Coast Line Railroad Co.

Witness may hand and seal of said court, at office, in Raleigh, this 22d March, 1926.

[SEAL.] EDWARD C. SEAWELL,
Clerk of the Supreme Court of the State of North Carolina.